APPENDIX

Dissenting Opinion of Commissioner Elman

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 8183

In the Matter of

AMERICAN OIL COMPANY, a corporation.

Commissioner Elman, dissenting.

I.

The Commission's disposition of this case calls to mind the observation of Mr. Justice Holmes that "To rest upon a formula is a slumber that, prolonged, means death." (*Collected Legal Papers*, p. 306) In the same vein he had warned, when he sat on the Supreme Judicial Court of Massachusetts, of the danger "of being misled by ready-made generalizations, and of thinking only in phrases to which, as lawyers, the judges have become accustomed, instead of looking straight at things, and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth*, 170 Mass. 596, 600.

It seems to me, with all deference to my colleagues, that they are deciding this case by resting upon, and applying uncritically, "formulas" and "too broadly generalized

conceptions" derived from significantly different factual contexts. I shall not attempt to catalogue all the difficulties and doubts that, in my mind at least, are engendered by the majority opinion. My disagreement here is with the basic presuppositions underlying the Commission's decision.

In a Section 2(a) Robinson-Patman Act case, two elements of proof are crucial to a finding of violation: price discrimination, and probable injury to competition. The former is clearly present here; as all agree. Respondent does not deny that the differences in price to its customers constituted "discriminations". It contends rather that the price differentials were not shown to have caused the requisite injury to competition, and were in any event justified by its competitive need to meet the lower prices of rival sellers.

The Commission finds no difficulty in disposing of the question of probable injury to competition. The law on this point, it declares, has been authoritatively settled by the Supreme Court's decision in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). There, the Commission's opinion states (p. 3), the Supreme Court held "that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial". The Commission's opinion continues: "Complete reliance upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition." The "positive" evidence cited by the Commission, however, simply shows that "competition did exist between the favored and nonfavored customers * * * and that the price difference between the two classes of

customers was sufficient to give the former a significant competitive advantage." (Opinion, pp. 3-4)

In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".

The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect.

Morton Salt was a classic "secondary line" case, where the seller established and regularly maintained a discriminatory "two-price system" under which his favored, usually larger, customers paid substantially less for the same products than other customers with whom they were in competition. Quite obviously, as the Supreme Court held, the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability of the disfavored customers to hold an effective competitive position vis-a-vis their favored rivals. 334 U.S. at 47-50; *cf., Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), cert. denied, 361 U.S. 826. In *Morton Salt*, the probable injury to competition was clearly and easily identifiable as an inevitable aspect of the discriminatory two-price system.

But, in so holding, the Supreme Court was expressing a conclusion based on the particular facts, not a universal rule of law.[1]

A finding of probable injury to competition does not require evidence that the disfavored buyers have gone out of business or are on the verge of bankruptcy. By the same token, evidence that such buyers have suffered a temporary loss of sales does not, without more, establish that their capacity to compete vigorously and effectively in the market has probably been injured. Whether probable

[1] "The scope given to the new concept of injury in the *Morton Salt* case was explicitly justified by the Supreme Court on the ground that without it *cumulative* effects would go unchecked. A question necessarily arises as to whether or not the scope of the concept of injury to a class of competitors should vary from one context to another with changes in the probability that there will be such cumulative effects." Edwards, *The Price Discrimination Law* (1959), p. 538 (emphasis added).

As Edwards also points out:

> "It is unreasonable to use the law of price discrimination to attack minute inequalities among buyers. Where such inequalities are ephemeral or have no central pattern, they may well be offset at other times or on other commodities. Any one buyer may sometimes be favored and sometimes disfavored. Moreover, since the defense of cost justification is not readily available, insistence on equal treatment in all particulars except where cost differences can be shown tends to make price structures unduly inflexible." (at p. 639)
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> "There is little reason to try to assure by law an equality of prices so pervasive that it prevails generally in the relation among small and numerous buyers. Though price discrimination may create disparities of opportunity among such concerns, the likelihood of offsetting disparities on other goods or at other times is so great that little would be gained from an effort to curb such inequalities. Substantial, consistent, cumulative inequality is to be expected only where favored buyers are relatively large and strong. Only in such circumstances are we justified in considering an intervention that subjects the detail of price relationship to pervasive control." (at p. 641)

injury to competition will result from a price discrimination entails, at the least, an inquiry into the nature, size, scope, and duration of the differential. Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall. But where the price discrimination is not comparable to that involved in *Morton Salt*, the effects on competition should be found "in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal." *Fred Brouner Corp.*, Docket 7068 (September 29, 1960).[2]

At this point, perhaps, it might be helpful to refer to another leading Robinson-Patman Act case, *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). That case is relevant here not because of any similarities in the factual situations involved, but because it makes clear the inappropriateness of adopting an automatic, verbal-formula approach in determining probable injury to competition. In *Anheuser-Busch* the Court held that under the Act a price "discrimination" is merely a difference in price. But, as the Supreme Court was careful to point out, its decision in that case "does not raise the specter of a flat prohibition of price differentials inasmuch as price differences constitute but one element of a Section 2(a) violation. In fact, as we have indicated, respondent has vigorously contested this very case on the *entirely separate grounds of insufficient injury to competition* and good faith lowering of price to meet competition." (*Id.*, p. 553; emphasis added)

[2] The same requirement is reflected in the Commission's 1948 Policy Statement, issued immediately after the Supreme Court's decision in *Morton Salt*. Relevant portions of this Statement are quoted in *General Foods Corp.*, 50 F.T.C. 885, 887-888 (1954).

Anheuser-Busch exemplifies what are described in anti-trust jargon as "territorial" price discriminations. As the legislative history of the Clayton Act of 1914 shows, one of the primary evils at which it was directed was injury to seller competition resulting from geographical or area price discrimination, typified by destructive local raids against small competitors by large multi-state sellers. As was stated in the House Judiciary Committee Report (H. Rep. 627, 63rd Cong., 2d Sess., p. 8):

> "It [Section 2] is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country."

In the instant case, it must be emphasized, neither the complaint alleges nor the proof shows that respondent, a major producer of gasoline, acting individually or in concert with other majors, engaged in selective price warfare directed against individual outlets of smaller, independent producers. Independents, as is well known, do not ordinarily have the resources to compete successfully with the majors in such price warfare; and where undertaken by major producers, its purpose and effect may well be either to drive the independents out of business or to coerce them into avoiding price competition, with the inevitable long-range result of rigidifying the price structure in the industry, and thus injuring competition in a most vital way.

But that is not this case. The facts here present a special and unique kind of price discrimination, with effects on competition that cannot automatically be assimilated to the familiar, systematic, continuing price discriminations which the Commission is accustomed to deal with and to which it customarily applies the *Morton Salt*

formula. What this case involves is a short-lived flurry of competitive price cutting by all sellers of gasoline in a local area. This phenomenon, usually described with dramatic hyperbole as a "price war", has long been familiar in the gasoline industry. But, although price wars have large importance to the gasoline industry and have been the subject of extensive study, no apparent consensus exists as to whether this phenomenon signifies the vigor of competition in this industry or the lack of it.

Ordinarily, of course, consistent uniformity of price between competitors is not regarded as proof of the existence of healthy, free competition in the industry. Nor, by the same token, would it generally be said that fluctuations in price and active underselling of competitors reflect unhealthy and restrictive competitive conditions. Whether particular price activity manifests the "competition that kills" or the competition that enables a free economy to grow and expand can only be determined upon inquiry into the relevant economic facts. Such inquiry has not been made in this case. The Commission's conclusion that the gasoline price "war" here was injurious to competition reflects only an unverified assumption based on a legal formula derived from *Morton Salt*. Thus, whether the periodic or occasional outbreak of gasoline price-cutting in a local area serves to increase or decrease competition at the producer, distributor and retailer levels of distribution remains an unresolved question of fact on which the Commission's opinion casts no light.

To repeat: my main difficulty with the majority opinion springs from its failure to recognize and to bring to bear an expert evaluation of the special and distinctive effects on competition of a local, limited gasoline price war. The Commission, it seems to me, has transformed a hard case into an easy one by applying an old well-worn formula taken from a different economic context and which, though appropriate for the situation in which it was developed, is out of place as applied to the facts of this situation—to which I now turn.

II.

Respondent, a major gasoline producer, was caught squarely in the middle of a brief but intense price "war" that flared up in and around Smyrna and Marietta, Georgia, for about two weeks in October of 1958. The complaint charged that, in the course of this two-week skirmish, respondent lowered prices to its dealers in Smyrna by greater amounts than to its competing dealers in Marietta. It was alleged that the result of respondent's actions "may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices." (This is the boiler-plate allegation of injury to competition at the "secondary" line of commerce.)

Smyrna is located approximately five miles northwest of Atlanta on State Route 3. Marietta is approximately four miles further north at the point where Route 3 and U.S. Route 41—which parallel each other from Atlanta—converge. Route 41 is a major north-south artery extending from Chicago to Miami. American sells gasoline in most of the states along this route—namely, Kentucky, Tennessee, Georgia, and Florida.

The price melee here began about October 10, 1958, when a Shell station lowered its price to meet the price of a newly-opened Paraland station. Shell is, of course, a major producer. Although "Paraland" is not regarded in the industry as a major brand, respondent's district sales manager testified that the company was owned by or affiliated with Phillips, another major producer. From this humble beginning the price-cutting rapidly spread throughout the Smyrna area. As in the case of most so-called "wars" in the gasoline industry, the dealers were not left to fight it out by themselves, but received the ammunition of "competitive price allowances" (or CPA's) from their suppliers. These lowered prices, in the form of CPA's, were apparently a matter of general knowledge in the trade. Unless he received these CPA's from his

supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business.

In the series of price reductions which ensued as the Smyrna "war" increased in intensity, American was never the leader. Its price reductions were made only to meet those previously made by its competitors. Thus, on the 11th of October, American increased its dealers' discount in Smyrna to 4.2 cents per gallon, meeting a price reduction by Sinclair on the previous day. On the 14th its discounts were increased to 6.7 cents, to meet Gulf and Shell; on the 15th to 8.7 cents, to meet Gulf and Sinclair; on the 17th to 10.7 cents, to meet Shell, Texas, and Sinclair; on the 20th to 11.7 cents, to meet Gulf, Shell, and Sinclair; and, finally, on the 21st to 14.7 cents, to meet Texas, Shell, and Sinclair. No further price reductions were made after October 21st, and by the 28th higher prices were restored and the two-week war, in which more gas than blood was spilled, was over.[3]

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[3] The following account of the war was given by American's district sales manager:

> Q. Mr. Myers, would you tell us your understanding concerning the circumstances relating to the start of the price war in Smyrna in October, 1958?
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> A. Well, I understand it was Paraland who operates or posts prices as an independent. They had a station on South Cobb Drive, and when they had that station under construction Shell or someone indicated that they would post the same price as Paraland should they open up as an independent, and when Paraland did open up as an independent, Shell did meet them. Shell had a station one block north of the Paraland location. Shell did meet them, and Paraland dropped their price again. I believe it was another 2 cents a gallon, and Shell met that when they did.
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> Then I think the next company was Sinclair, and I think Gulf and several others dropped to meet that competition. Then all companies dropped to meet it to meet the other major competition. And then they kept this price decreasing until it got to the ridiculous extent that it got to. (Tr. p. 576)

The impact of these events in Smyrna on prices in Marietta, five miles away, was neither immediate nor severe. Again only following the lead of its competitors, American had by October 22 increased the CPA's granted its Marietta dealers to 9.7 cents, but there still remained a differential of 5 cents per gallon between the prices to its dealers in the two communities.

Since Smyrna and Marietta are geographically adjacent, gasoline dealers in one community compete with those in the other. The price war here gave the Smyrna dealers a brief, temporary advantage in this competition, in that their lower prices attracted business away from gas stations in Marietta. American dealers in Marietta were among those who lost sales and, according to the evidence, customers who usually purchased American's products in Marietta switched to stations in Smyrna. But, so far as appears, the business of the Marietta dealers returned to normal at the end of the two-week war, and this temporary diversion of sales had no effect on their ability to remain in effective competition with other dealers.

III.

Although the marketing effects of a concentrated, confined outburst of price-cutting such as occurred here are far from clear, the Commission, relying upon the *Morton Salt* case, infers probable injury to competition from the fact that American charged substantially different prices to competing customers. But, as already pointed out, that case involved a regular, established, continuing multiple-price system, which inevitably impaired the capacity of the disfavored customers to remain effective competitors in the market. American's price discriminations, however, were immediate and transient responses to a temporary competitive situation over which it had no control. This does not mean that what American did was necessarily legal. It does mean, however, that the necessary competitive injury cannot be inferred simply on the authority of *Morton Salt*.

In the first place, it appears to have been the price war generally—a situation which American did not create—which was responsible for any competitive injury to its Marietta dealers. Section 2(a) requires that probable competitive injury derive from the discrimination or difference in price charged to different buyers. But American reduced prices to its Smyrna dealers only after equally large price reductions had been made by competing producers and by their dealers. The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business. No matter what American did, the lower prices brought about by the war in Smyrna would have caused many customers in Marietta to drive to Smyrna to buy gasoline.

Second, the Smyrna price "war" was but a skirmish, lasting barely two weeks. True enough, in that period many of the Marietta dealers' customers bought gas in Smyrna. But the Act does not insulate businessmen from transient losses of sales, but only against the likelihood of "injury to competition". At the end of the war the business of the Marietta dealers returned to normal, and there is neither allegation nor proof of any permanent diversion of customers. In fact, the record shows that at least one of them enjoyed substantially greater sales in October 1958 than he did in the same month of either the preceding or following year. This is certainly a far cry from the injury to competition found in *Morton Salt*.

I see no justification for the Commission's statement that the burden of proof is on respondent to show that "these

practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta or elsewhere." The burden is upon the Commission to establish the required competitive injury. A finding that such injury would result from a continuation of the allegedly illegal discriminations must be predicated on the facts showing the likelihood of such continuation, not speculations or inferences drawn from the absence of facts in the record. And where, as in this case, the only competitive injury alleged is to particular disfavored customers, the evidence must relate to them and not to other dealers "elsewhere".[6] This is not an "abandonment" problem. The fact that the Commission is "convinced . . . that respondent will continue to violate Section 2(a) unless ordered to cease and desist" would be relevant if illegality had been proved. It is irrelevant in determining whether the facts in the record prove the requisite competitive injury alleged in the complaint.

Finally, and perhaps most important, the competitive effects of American's price discriminations cannot be viewed apart from the effects of the price war as a whole. American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control. In a price war someone is found to be hurt, and if American chose the course of action having the least injurious effects on competition, it should not be condemned as a

[6] The recurrence of a price war which would cause American again to disfavor its Marietta dealers seems highly unlikely. As this record clearly shows, gas wars of this type are not planned or the product of a policy of systematic price discriminations, but are the immediate competitive responses to individual competitive situations. The Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted. The record shows no recurrence of price warfare affecting dealers in either Smyrna and Marietta between October 1958 and the filing of this complaint in November 1960.

law-violator merely because sales were temporarily diverted from some of its dealers.

IV.

In the situation shown by the record in this case, American—which, I repeat, did not start the price fracas but found itself caught helplessly in the middle of all the shooting—had three alternatives open to it.

First, it could have done nothing, maintaining its regular prices to all of its dealers in Smyrna and Marietta. The result would have been that these dealers would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers. Competitively, the injury to respondent's dealers would have been far more drastic.

Secondly, American could have done what it in fact did, with the results shown by this record.

Thirdly, American could have done what the Commission apparently thinks it was required to do by Section 2(a)—either reduce its prices equally to all of its dealers, or "feather" them out in some way, perhaps diminishing in concentric circles from the starting point of the war, on the theory that the differentials between stations would then not have been sufficiently large to cause any diversion of business between competing stations. But either of these courses of action would surely have intensified the price-cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war. This dilemma is described in the testimony of American's Atlanta branch manager. In response to Commission counsel's question as to whether American's 9-cent differential to dealers two miles apart was a sufficient ground for him to recommend an increase in the unfavored dealer's CPA, he replied:

> "Quite frankly, at that time I was in a dilemma as to what to do. If you put it in you could spread it; if you kept it out you might be hurting your dealers.

That was the way I presented it to my Division Manager, and we didn't know what to do" (Tr. p. 570).[5]

If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?

Determination of the questions posed by this case, it seems to me, involves much broader considerations than those on which the majority here base decision. For example, the effects upon the independents who seem to provide much of the competition which exists in this industry must be taken into account.[6] I do not believe that these

[5] The possibility of "feathering" would not have resolved respondent's dilemma. In the first place, it ran the risk that any differences in price between competing customers would be regarded by the Commission as "substantial" and hence *prima facie* illegal. Second, if a two-cent reduction was sufficient to start the war, any price cut by American large enough to help its dealers in areas which the war had not yet reached would simply have served to set off the spiral of reductions anew.

[6] It seems to me that the possible injury to independent dealers, distributors and producers which might result from the spread of the war would have a far more serious effect upon the vigor of competition in the industry as a whole than would the temporary diversion of sales from a few dealers in Marietta. Commenting

knotty questions can properly be avoided by focusing narrowly on "secondary line" injury and adopting a mechanical test designed for the entirely different factual situation involved in *Morton Salt*. The Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist (see my dissent in *National Retailer-Owned Grocers, Inc., et al.*, Docket 7121, May 14, 1962).

V.

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 10), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962.

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upon the current prevalence of price wars in the gasoline industry, a recent article in the New York Times (May 20, 1962) stated:

> "In the present disturbed markets, the distributor and also the dealer of the major companies generally are getting at or near their normal margin of profit and they are not being particularly hurt in the present price struggle. But the independent dealer and the distributor who does not have a major company to back him are being hurt badly in the price wars. The independent refiner, who supplies their products, also is finding it difficult to make ends meet."

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

The Commission finds (opinion, pp. 7-10) that the price war in the Smyrna area began when a Shell service station met the price of a competing Paraland station; that Paraland is a "private brand" of gasoline which is "traditionally sold at a lower price than the major brands"; that "the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station"; that, therefore, the Shell station was "beating", and not meeting, competition when it reduced its price to the same level as that of its newly-opened Paraland competitor; that Shell's price reduction, being discriminatory and not made in good faith to meet the lower price of a competitor, was therefore illegal; that when respondent and the other major oil companies in turn reduced *their* prices to meet the competition of Shell's lower price, they were meeting a price which was illegal; and that, accordingly, respondent "knew or should have known that it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute."

Let us assume—although I have the most serious doubts about it—that the record supports all of these findings made by the Commission. The Smyrna price war occurred in October 1958. If the Commission had received a telegram from respondent at that time, could and would it have been able to render an advisory opinion that the price reductions made by respondent's competitors were illegal? Now, almost four years later and only after an extensive hearing, the Commission finds that the lower prices of respondent's competitors—who are not parties to this proceeding—were illegal and that respondent's "good faith"

defense must therefore be rejected. If they were parties to this proceeding, respondent's competitors might be able to justify the legality of their price reductions. At all events, their "conviction" here, in a case where they are not parties and where no complaint was made against them, is the basis of "convicting" respondent of violating the law in not acting in "good faith".

This seems to me to place an unrealistic and competitively unfair burden on businessmen. "Good faith" does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these "third-party" prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation. In this case, for example, how was respondent in October 1958 to know that "Paraland", owned by a "major" producer (Phillips), would be regarded by the Commission in June 1962 as a "private" brand entitled, apparently as a matter of law, to a "normal" differential of 2 cents a gallon lower than "major" brands? Why should respondent have "known" in October 1958 that the Commission would in June 1962 find that all of the competitive lower prices which it met were discriminatory, injured competition, were not cost-justified, were not made "in response to changing conditions affecting the market", were not made in good faith to meet competition, etc. As I said in my *Tri-Valley* dissent, "The law should not be construed as forcing a seller to compete at his peril." I fail to see what the requirement of this kind of long-range prophesying in the dark by a seller in a competitive market has to do with his subjective good faith.

Finally, as in the *Tri-Valley* case, if the illegality of the prices met by respondent was so apparent, why is it that

the Commission did not simultaneously bring price discrimination charges against all of its competitors who were equally involved in the Smyrna price war? The Commission obviously knew of these "unlawful" price reductions by respondent's competitors before this complaint was issued. It seems to me inequitable and not in the public interest to have proceeded against respondent alone. The order here operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively. It seems fair to ask: Has the Commission's action here really promoted the "competition" which the Robinson-Patman Act was intended to protect and encourage?

June 27, 1962